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ABSTRACT

Some possible uses to which the photocopying of copyright works can be put under the Copyright Act of 1968 are explored. The topics considered are "substantial part," fair dealing in relation to research, private study and published criticisms or reviews, photocopying limitations, illustrations and multiple copies. The law, as interpreted by those who have used it, is not unduly restrictive. Nevertheless, there must be a limit on the unlicensed photocopying of copyright works. (AB)

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Photocopying and the Law

A guide for Librarians and Teachers and other suppliers and users of photocopies of copyright work

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Australian Copyright Council

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The Australian Society of Authors
The Australian Book Publishers Association
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Institute of Australian Photographers
The Australian Journalists' Association
Professional Musicians' Union of Australia
Australian Centre of International P.E.N.
The Poetry Society of Australia
The Australian Writers Guild

The Australian Copyright Council gratefully acknowledges the permission given by The Society of Authors and The Publishers Association of the United Kingdom for permission to use their booklet "Photocopying and The Law" as a basis for this work.

PHOTOCOPYING AND THE LAW

The right of libraries of various kinds, and of individuals, to make photocopies (including microphotocopies) of copyright material is widely misinterpreted. In general, the public at large (and libraries in particular) have wider rights than is often supposed; on the other hand, usually through ignorance of the law, abuse tends to be widespread. The object of this statement is to set out the facts.

There are two main points to be borne in mind by those who wish to copy copyright material:

(i) No infringement of copyright can arise unless a substantial part of the copyright work is involved;

(ii) Even where a substantial part is involved, such copying may be permissable under the Copyright Act, 1968, as fair dealing (a) for the purpose of research or private study (Section 40) or (b) for the purposes of published criticism or review (Section 41).

It will therefore be useful to consider these factors first.

"SUBSTANTIAL PART"

In view of Section 14(1) of the Act there can be no infringement of copyright in a particular work unless a "substantial part" of it is taken. This is not always fully understood but is of prime importance since it may be taken in law as overriding any other limitations contained in the Copyright Act. The Act does not, however, define what a "substantial part" is.

It may, however, reasonably be supposed that the "substantiality" of any extracts from a copyright work must depend on (a) the length of the work as a whole, and (b) the importance of the extracts in relation to the work as a whole. A claim that the extract was not "substantial" could hardly be successful, for example, if the extract included a summary of the work (or of a part of the work dealing with a specific subject) either in words or, say, in the form of a diagram, graph, statistical or mathematical table or a scientific formula, so that the core of the work (or any specific part of the work) was contained in the extract.

FAIR DEALING IN RELATION TO RESEARCH OR PRIVATE STUDY

Section 40 of the Act states that "a fair dealing with a literary, dramatic, musical or artistic work . . . . . for the purpose of research or private study does not constitute an infringement of the copyright in the work". Legal precedent, however, has established that such "fair dealing" must be exercised by the individual for himself, and not by any one person on behalf of another. It thus follows that while a student or researcher may make copies of extracts from a work (or even the whole of the work) for himself, he may not make such a copy for another, without, in effect, "publishing" the work, and thus infringing its copyright.

FAIR DEALING IN RELATION TO PUBLISHED CRITICISM OR REVIEW

In the absence of any legal definition of the extent to which copyright works may be used without infringement, the Society of Authors and the Publishers Association in the United Kingdom jointly agreed in 1958, following the introduction of new United Kingdom copyright legislation in 1956, that, while the limits of "fair dealing" must vary according to the circumstances, it would be a convenience to all concerned if a general understanding could be established for normal practice. They therefore agreed that they (i.e. the authors and the publishers, together representing the copyright proprietors) would not regard it as "un-fair" if for purposes of criticism or review a single extract up to 400 words, or a series of extracts (of which none exceeded 300 words) to a total of 800 words were taken from prose copyright works, or if any extracts up to a total of 40 lines were taken from a poem, provided that in no case this extract amounted to more than one quarter of the poem. This joint statement was issued in respect of the provisions of the United Kingdom Act which correspond with Section 41 of the Australian Act and which relates specifically to "fair dealing . . . for purposes of criticism or review". The Act requires that any such use shall be accompanied by sufficient acknowledgement.

The Australian Copyright Council representing copyright owners in Australia, has adopted principles of "fair dealing" in this area similar to those formulated in the United Kingdom in 1956.

PHOTOCOPYING BY LIBRARIES

The rights of libraries to make photocopies of copyright works are set out as special exceptions in Section 49 of the Act. The only libraries entitled to take advantage of these exceptional provisions are those which are not established or conducted for profit. The provisions will clearly apply to school, university, municipal and government libraries.

Such libraries do not have an absolute right to make copies without restriction for anyone who requires them. The libraries covered by Section 49 (other than Parliamentary libraries which are dealt with separately) are free to make a single copy of a whole article or part of an article in a periodical or a single copy of a part (which can be no more than a "reasonable portion") of any other published work provided that -

(a) the person supplied with a copy has first satisfied the librarian or a person acting on behalf of the librarian that he requires the copy for the purpose of research or private study and that he will not use it for any other purpose;

(b) the person in question has not previously been supplied by the same library with a copy of the same material; and

(c) the person is required to pay for the copy an amount not less than the cost of making it.

For these purposes, an "article" contained in a periodical is anything other than an artistic work appearing in the periodical. Where however, any

periodical article or any other work is accompanied by explanatory or illustrative artistic works, such as drawings, pictures or diagrams, a reference to a copy of the whole of the article or to a part of the article or other work includes a reference to a copy of that whole or part together with the illustrations which explain it.

In the United Kingdom a librarian supplying a copy under provisions similar to those discussed above is required by law to obtain from the applicant a signed form or declaration and undertaking as to the purpose for which the copy is required and will be used.

There is no similar provision in Australia and a librarian has a positive duty to satisfy himself as to the applicant's purpose and to ensure that no copy of the same material has previously been supplied to the same person.

The use of photocopying machines, which is nowadays a feature of the service provided by many public and other libraries, is clearly liable to be in contravention of the Act in cases where the users of such machines are left free to make copies without hindrance. Librarians should bear in mind that they remain responsible for machines operated on their premises. It also follows, of course, that the unrestricted use of similar machines in railway stations and other public places may expose the user to the risk of committing a breach of copyright.

LIMITS OF PHOTOCOPYING

Apart from the special exceptions covered by Section 49, photocopying may be permissible as "fair dealing . . . for the purpose of research or private study" under Section 40. The 1958 joint statement by the United Kingdom authors and publishers does not cover fair dealing of this sort.

Proper regard for copyright is essential to the continued publication of works of all kinds (technical, scientific and educational, no less than biography, travel and fiction), for if free copying so reduces sales of the original commodity that publication becomes uneconomic, in the last resort important publishing in many fields must wither away. Without some reasonable control the source material, upon which those who wish to make photocopies depend, will cease to exist. The need thus becomes apparent for some sensible measure of "fair dealing . . . for the purpose of research or private study".

The Society of Authors and the Publishers Association in the United Kingdom, have, therefore suggested limits which authors and publishers generally would not regard as unreasonable for photocopying purposes. They have agreed that they would not normally regard it as "unfair" if a single copy is made from a copyright work of a single extract not exceeding 4,000 words, or a series of extracts (of which none exceeds 3,000 words) to a total of 8,000 words, provided that in no case the total amount copied exceeds ten per cent of the whole work. Poems, essays and other short literary works must be regarded as whole works in themselves, and not as "parts" of the volumes in which they appear. The Australian Copyright Council has adopted these principles.

It has to be made clear that this rule of thumb measure is not a matter

of law, but is merely an indication by two responsible societies of what they, as representatives of the generality of copyright owners, would regard as reasonable. It is probable, however, that any Court of Law called upon to determine whether copyright had been infringed by photocopying would take account of this joint statement.

ILLUSTRATIONS

Librarians are also often asked to provide photo-positives (or even "slides") of illustrations from copyright works, including graphs, charts, technical drawings and other kinds of illustrated matter. In general works of this kind are regarded as complete copyright works in themselves (i.e. as artistic as distinct from literary copyright works), so that while the photocopying of such works might be thought of as no more than a photocopying of an "extract", in fact it is nothing of the sort.

It would, however, be an unusual publisher who would regard the reproduction of a single illustration for classroom or lecture hall projection as infringing his copyright, so that in general it may be regarded as reasonable for librarians to make such single copies without reference to the copyright proprietor. In fairness, however, librarians should ensure that any such illustration is accompanied by suitable acknowledgement to the source so that the copyright proprietor is at least given credit for work.

Those who used epidiascopes did not always own the books whose pages they projected on the screen, but often borrowed them from libraries. Limited photocopying of this sort would therefore seem to be no more than a recognition of a new projection technique.

The Australian Copyright Council (adopting recommendations of the Society of Authors and the Publishers Association in the United Kingdom) has therefore included such photocopying within the limits which it would regard as reasonable, provided that subsequent use of the copy falls within the limits laid down in Sections 200 and 28 of the Act. This means, in brief, that the authors (and artists) and the publishers would not in general object to the making of a single copy of such an illustration (in the form of a slide or otherwise) provided it was used solely in the course of instruction in a place of education.

This does not mean, of course, that any librarian (or anyone else) would be free to make multiple copies of illustrations to be handed round for class use. Such reproduction would be a clear infringement of copyright and permission must always be sought.

MULTIPLE COPIES

We have this far been concerned only with the reproduction of single copies. It will be recalled that those libraries which are privileged under the Act are allowed to supply no more than a single copy of any photocopied article from a periodical publication or an extract from a book to any one person, provided that that person has not been supplied with a copy of it by that library. Moreover, the librarian must be satisfied by the applicant that the copy is required "for research or private study" and will not be used for any other purpose. The use made in the Act, of the expression "private study"

makes it clear that it is not the intention of the Act that, for example, a number of students in a college or school should each obtain single copies of extracts which they may require for their communal studies in class; for such studies could not generally be regarded as "private".

Librarians in various kinds of libraries and educational establishments are nevertheless frequently asked by their teaching colleagues to produce multiple copies of extracts from copyright works for class or lecture hall use. Teachers should understand that when they make such a request the librarian is bound by law to refuse, unless he has first obtained the express permission of the copyright owner. To ignore the law is to attempt (no doubt unwittingly) to undermine the economic basis upon which the publication of books for succeeding generations must depend.

The restrictions on the free use of copyright material for educational purposes are laid down in sections 200 and 28 of the Act.

Under Section 200, copyright will not be infringed if a work is reproduced or adapted

(a) in the course of educational instruction, where the reproduction or adaption is made by a teacher or student otherwise than by the use of an appliance adapted for the production of multiple copies; or

(b) as part of an examination question or answer.

Section 28 deals with "performance" (that is "any mode of visual or aural presentation") of any literary, dramatic or musical work in educational establishments. Provided that the conditions specified in the section are satisfied, performance in a school, university or college cannot be the subject of infringement proceedings.

The strict nature of the conditions prescribed in both section 200 and section 28 must be noted.

There may sometimes be occasions when the reproduction of, say, two dozen copies of an extract from a particular work will not endanger the economic viability of the work at all. The law is there to ensure that the risk is avoided, but it would be unusual for a publisher to refuse to give permission for such copies to be made in circumstances where no such danger existed. The important thing is that such multiple copies may not be made without permission, so that permission must always be sought.

CONCLUSION

It is not possible within the limits of this statement to attempt to explore exhaustively all the possible uses to which the photocopying of copyright works can be put. It is hoped, however, that enough will have been said to indicate the general limitations of the law on the one hand, and of practicality on the other, which govern such use. Authors and publishers have made it clear by their "general licence" that they do not wish unreasonably to restrict the photocopying of their works; but copyright exists for the encouragement of learning in the interests of society as a whole and must therefore be respected. It is hoped that this article has shown the law, as interpreted by those who have practical experience of its operation, is not unduly restrictive, but that, at the same time, the unlicensed photocopying of copyright works must have some limit.